

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

KARI A WILHELM
Claimant

KWIK TRIP INC
Employer

APPEAL NO. 11A-UI-03348-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/16/11
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated March 9, 2011, reference 01, that held the claimant was not discharged for misconduct on January 14, 2011, and benefits are allowed. A hearing was held on April 6, 2011. The claimant, and her mother, Joleen Wilhelm, participated. Andrew Lange, Store Leader, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant began employment on July 13, 2010 as a part-time guest service co-worker, and last worked for the employer on January 12, 2011. The claimant received the employer policy for retail co-workers. The policy does not provide for progressive discipline such as verbal and/or written warnings to put an employee on notice they might be terminated. The only employer correction regarding claimant's work performance was a 90-day evaluation.

The employer has a policy that an employee find a replacement worker if he or she is going to miss work for any reason. The claimant called in absences due to illness for her work shifts on January 10 and 11, 2011. She attempted to find replacement workers but she was not successful. When she reported to work on January 12, she provided a doctor's note excusing her from work. When the employer questioned her about not finding a replacement, she responded that she did. While claimant admitted she did not call co-worker "Lucas" because they did not have a good working relationship, she did call co-workers "Heather", "Megan" and "Jason". Claimant added that store leader Lange had contacted her on at least two occasions to replace a co-worker. The employer discharged claimant on January 14, 2011 for employee dishonesty regarding her attempt to find a replacement co-worker.

The employer had raised an issue with claimant in her October 19, 2010 performance evaluation about not being honest in having a co-worker replace her. She was not disciplined for this incident.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The administrative law judge concludes that the employer failed to establish a current act of misconduct in the discharge of the claimant on January 14, 2011, for employee dishonesty.

The employer did not believe claimant made a good faith effort to find a replacement worker when she was absent due to illness on January 10 and 11, and she was dishonest about the effort she did make. While the employer has a policy that requires a sick employee to find a replacement worker, it is not misconduct when the effort is unsuccessful. Claimant offered credible testimony she made a good faith effort to find a replacement, but the employer concludes she was dishonest by failing to call one co-worker. Since the store leader had requested claimant substitute as a co-worker for another employee, the employer replacement policy is not uniformly enforced.

While the employer has the right to establish such policy as it will, the failure to issue any prior written warning for a job performance issue puts into question whether it established the required standard of behavior. A Job performance evaluation with work performance issues is not the same as a disciplinary warning. Although the employer questioned the honesty of the claimant when she had a replacement worked in the October evaluation, she was not disciplined.

DECISION:

The decision of the representative dated March 9, 2011, reference 01, is affirmed. The claimant was not discharged for a current act of misconduct in connection with employment on January 14, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css